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No. 289

In the Supreme Court of the United States

OCTOBER TERM, 1940

KATHERINE KRAFT, PETITIONER

v.

GUY T. HELVERING, COMMISSIONER OF INTERNAL REVENUE

ON PETITION FOR A WRIT OF CERTIORARI TO THE UNITED STATES CIRCUIT COURT OF APPEALS FOR THE THIRD CIRCUIT

BRIEF FOR THE RESPONDENT IN OPPOSITION

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OPINIONS BELOW

The opinion of the United States Board of Tax Appeals (R. 77–81) is reported in 40 B. T. A. 240. The opinion of the Circuit Court of Appeals for the Third Circuit (R. 88–91) is reported in 111 F. (2d) 370.

JURISDICTION

The judgment of the Circuit Court of Appeals was entered on April 16, 1940 (R. 91–92). The petition for a writ of certiorari was filed July 13, 1940. The jurisdiction of this Court is invoked under Section 240 (a) of the Judicial Code, as amended by the Act of February 13, 1925.

QUESTION PRESENTED

Petitioner, as grantor of five trusts, reserved the power to revest title to each corpus in herself after the end of any calendar year by an instrument served upon the trustees at least five days prior to the expiration of the year. She executed no such instrument during 1933 and received none of the trust income during 1934. Section 166 of the Revenue Act of 1934—the first specifically to tax such income to the grantor—was enacted in May 1934. The question is whether the income from the trusts during the year 1934 may constitutionally be taxed to the grantor.

STATUTE AND REGULATIONS INVOLVED

The applicable statute and regulations will be found in the Appendix, *infra*, pp. 7–11.

STATEMENT

The facts, as stipulated and found by the Board of Tax Appeals (R. 72–76, 77–81), are substantially as follows:

On or about November 20, 1930, and December 15, 1932, the petitioner, by instruments in writing, created five separate trusts for the benefit of certain named beneficiaries (R. 72, 73). The trust agreement in which Clarence Conklin is named as beneficiary of the income is typical of the other trust instruments (R. 73, 74). It reads in part as follows (R. 25–26, 73–74):

> SECOND,—The * * * [grantor] shall have the right by an instrument in writ-

> ing * * * served on the Trustees * * * at least five days before the expiration of any calendar year, to revoke this trust, in whole or in part, after the end of any such calendar year; * * *
>
> THIRD,—Upon the termination of this trust, all property and/or securities affected hereby shall belong absolutely to and shall vest immediately in the * * * [grantor] if she shall then be living, free and clear of any trust hereunder, * * * and if said * * * [grantor] shall then be dead, same shall belong absolutely to and vest immediately in the estate of the * * * [grantor] and same shall be distributed by the executors and/or administrators of the * * * [grantor] as part of her estate, free and clear and discharged of and from any trust hereunder, * * *.

No notice of revocation of any of the trusts was given by petitioner at any time prior to or during the calendar year 1933; such trusts were in full force and effect during the whole of the calendar year 1934, and the respective beneficiaries were entitled to and actually did receive the trust income during the year 1934 (R. 74–75).

The Commissioner of Internal Revenue determined that, under Section 166 of the Revenue Act of 1934, the income from the five trusts was taxable to petitioner, and asserted a deficiency in the amount of $9,731.84 (R. 75). The determination was sustained by the Board of Tax Appeals (R. 82); the court below affirmed (R. 92).

ARGUMENT

Petitioner concedes (Pet. 10–11), as she must,[1] that the measure of control retained by her as grantor brings the situation within the literal terms of Section 166 of the Revenue Act of 1934 (Appendix, *infra,* p. 7). Her only reason for urging that the judgment below be overturned is the alleged unconstitutionality of Section 166 as applied in the particular instance. The sole foundation for this charge is the circumstance that Section 166 was enacted by Congress (in May 1934) some five months after the expiration of the period (prior to December 26, 1933) during which petitioner could have exercised her right to revoke the trusts for the year 1934.

1. It may be observed, at the outset, that the sub-

[1] The reasons for this section, as set forth in the statement of the House managers in the Conference Report relating to the Revenue Act of 1934, clearly show an intention to tax such trusts (H. Rep. No. 1385, 73d Cong., 2d Sess., p. 24):

"Amendments nos. 96 and 97: Under existing law, the income from a revocable trust is taxable to the grantor only where such grantor (or a person not having a substantial adverse interest in the trust) has the power within the taxable year to revest in the grantor title to any part of the corpus of the trust. Under the terms of some trusts, the power to revoke cannot be exercised within the taxable year, except upon advance notice delivered to the trustee during the preceding taxable year. If this notice is not given within the preceding taxable year, the courts have held that the grantor is not required under existing law to include the trust income for the taxable year in his return. The Senate amendments require the income from trusts of this type to be reported by the grantor. The House recedes."

ject of the tax here is not the creation of the trusts or the initial transfer of the corpus, as in the case of taxes on gifts, but the income of the trusts which accrued after the effective date of the statute. *Reinecke* v. *Smith*, 289 U. S. 172, 175. This Court has repeatedly recognized the power of Congress, in accordance with its established practice, to make income tax statutes retroactive for a limited period. *United States* v. *Hudson*, 299 U. S. 498, 500; see *Welch* v. *Henry*, 305 U. S. 134, 146–150; *Milliken* v. *United States*, 283 U. S. 15, 21. The real complaint of petitioner is that the statute in question was enacted in May instead of in the preceding December. Clearly, the extent of the retroactivity under the circumstances is within the limits held permissible in the cited cases.

2. *Hoeper* v. *Tax Commission*, 284 U. S. 206, on which petitioner relies (Br. 21), was concerned with an attempt to tax income arising from property to one who at no time had either title or control over the property or its income. It clearly bears no resemblance to the instant case. See *Whitney* v. *Tax Commission*, No. 541, October Term, 1939; *Burnet* v. *Leininger*, 285 U. S. 136, 142. The petitioner as grantor of the five trusts here retained dominion and control over the corpus as extensive, to say the least, as that which has been held to justify a tax in numerous cases before this Court. See, *e. g.*, *Helvering* v. *Clifford*, 309 U. S. 331; *Du Pont* v. *Commissioner*, 289 U. S. 685, 689; *Reinecke* v. *Smith*, 289 U. S. 172, 178.

Nor is the principle announced in *Eisner* v. *Macomber,* 252 U. S. 189 (Br. 21), applicable here; no problem of defining income is involved. The issue here is whether Congress has power to allocate admitted income to one who retains so many of the attributes of ownership over the property producing the income. The decided cases leave no doubt that it has.

CONCLUSION

The application of the statute here is plainly constitutional under the principles laid down by this Court. There is no conflict of decisions. The petition, accordingly, should be denied.

Respectfully submitted.

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